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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 JESSE CRUZ, *et al.*,

11 Plaintiffs,

12 v.

13 WABASH NATIONAL
14 CORPORATION,

15 Defendant.
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Case No. 2:12-cv-1627-LDG (VCF)

ORDER

19 In their complaint, the plaintiffs allege that on April 17, 2010, plaintiff Jesse Cruz
20 “was forced to pull over on the side of the road due to a defect in the trailer” that defendant
21 Wabash National Corporation built in 1998. Wabash moves to dismiss (#7), which motion
22 the plaintiffs oppose (#8). Having considered the arguments and the complaint, the Court
23 will grant the motion.

24 Motion to Dismiss

25 The defendant’s motion to dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(6),
26 challenges whether the plaintiffs’ complaint states “a claim upon which relief can be

1 granted.” In ruling upon this motion, the court is governed by the relaxed requirement of
2 Rule 8(a)(2) that the complaint need contain only “a short and plain statement of the claim
3 showing that the pleader is entitled to relief.” As summarized by the Supreme Court, a
4 plaintiff must allege sufficient factual matter, accepted as true, “to state a claim to relief that
5 is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
6 Nevertheless, while a complaint “does not need detailed factual allegations, a plaintiff’s
7 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels
8 and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
9 *Id.*, at 555 (citations omitted). In deciding whether the factual allegations state a claim, the
10 court accepts those allegations as true, as “Rule 12(b)(6) does not countenance . . .
11 dismissals based on a judge’s disbelief of a complaint’s factual allegations.” *Neitzke v.*
12 *Williams*, 490 U.S. 319, 327 (1989). Further, the court “construe[s] the pleadings in the
13 light most favorable to the nonmoving party.” *Outdoor Media Group, Inc. v. City of*
14 *Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).

15 However, bare, conclusory allegations, including legal allegations couched as
16 factual, are not entitled to be assumed to be true. *Twombly*, 550 U.S. at 555. “[T]he tenet
17 that a court must accept as true all of the allegations contained in a complaint is
18 inapplicable to legal conclusions.” *Ashcroft v. Iqbal* 556 U.S. ___, 129 S.Ct. 1937, 1949
19 (2009). “While legal conclusions can provide the framework of a complaint, they must be
20 supported by factual allegations.” *Id.*, at 1950. Thus, this court considers the conclusory
21 statements in a complaint pursuant to their factual context.

22 To be plausible on its face, a claim must be more than merely possible or
23 conceivable. “[W]here the well-pleaded facts do not permit the court to infer more than the
24 mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the
25 pleader is entitled to relief.” *Id.*, (citing Fed. R. Civ. Proc. 8(a)(2)). Rather, the factual
26 allegations must push the claim “across the line from conceivable to plausible.” *Twombly*.

1 550 U.S. at 570. Thus, allegations that are consistent with a claim, but that are more likely
2 explained by lawful behavior, do not plausibly establish a claim. *Id.*, at 567.

3 An indicator that the plaintiffs' complaint is deficient is when their opposition, as in
4 this case, begins by reciting facts not alleged in the complaint. In considering the motion,
5 however, the Court is limited to considering the facts alleged in the complaint, not facts that
6 the plaintiff could have pled. Regardless of whether the plaintiffs could have sufficiently
7 pled how the trailer was defective (and without deciding whether their opposition asserts
8 sufficient facts to support claims for negligence and strict products liability), they did not do
9 so in their complaint. Accordingly, dismissal of these claims is appropriate.

10 As to plaintiffs' claim for breach of the implied warranty of fitness, Wabash correctly
11 notes that such a claim in Nevada requires horizontal privity. *See Long v. Flanigan*
12 *Warehouse Co.*, 79 Nev. 241, 246, 382 P.2d 399 (Nev. 1963). The plaintiffs' reliance upon
13 *Hiles Co. v. Johnston Pump Co. of Pasadena, Cal.*, 93 Nev. 73, 560 P.2d 154 (Nev. 1977)
14 is plainly misplaced, as that decision recognized the well-established point that "*vertical*
15 privity is not required in actions for personal or property injury caused by defective
16 products." *Id.* at 78 (emphasis added).¹ Further, given that the plaintiffs limit their
17 opposition to arguing that Nevada "dispensed with the privity requirement," and have not
18 suggested they could allege horizontal privity, the Court will dismiss this claim with
19 prejudice.

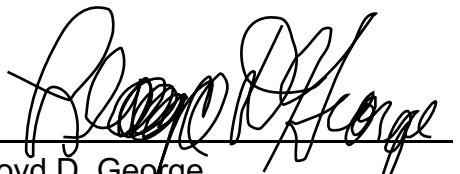
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21 Therefore, for good cause shown,

22 THE COURT **ORDERS** that Defendant Wabash National Corporation's Motion to
23 Dismiss (#7) is GRANTED as follows: Plaintiffs' First and Second Causes of Action are

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25 ¹ The plaintiffs' quotation of this language while omitting the word "vertical" is
26 not well-taken, particularly as the court in *Hiles* expressly distinguished *Long* because *Long*
"dealt with horizontal, not vertical privity. . . ." 93 Nev. at 78.

1 DISMISSED without prejudice; Plaintiffs' Third Cause of Action is DISMISSED with
2 prejudice.

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4 DATED this 18 day of March, 2014.


Lloyd D. George
United States District Judge